TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~376~~ 172

THE NIAGARA FIRE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES AND JOSEPH R. WEIDE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED DECEMBER 10, 1870.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States in and for the district of Minnesota, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment in a suit before you or some of you, between Charles Weide and Joseph R. Weide, plaintiffs, and The Niagara Fire Insurance Company, defendant, in a plea which is in the said circuit court, a manifest error hath happened to the great damage of the said The Niagara Fire Insurance Company, defendant, as it says; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington, on the fifth day, the first Monday, in December next, in the said Supreme Court, to be then and there
2 held, that, the records and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at St. Paul, in said district of Minnesota, this 11 day of July, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth year.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States, for the District of Minnesota.

LAMPREYS, MORRIS LAMPREY,
Attorneys for Pl'ff in Error.

3 (Indorsed:) United States circuit court, district of Minnesota. Niagara Fire Ins. Co., pl'ff in error, vs. Cha's Weide et al., def'ts in error. Writ of error. Filed July 11, 1870. H. E. Mann, clerk.

4 The answer of the judges of the circuit court of the United States for the district of Minnesota in the within writ mentioned:

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the judges of the Supreme Court of the United States within mentioned in a certain schedule to this writ annexed as within it is commanded.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at St. Paul, in the district of Minnesota, this eleventh day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth year.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota.

(Indorsed:) United States circuit court, district of Minnesota. Niagara Fire Ins. Co., pl'ff in error, vs. Cha's Weide et al., d'f'ts in error. Writ of error. Filed July 11, 1870. H. E. Mann, clerk.

Copy of a writ of error lodged in pursuance of the statute of the United States, in such case made and provided, for the above-named Charles Weide and Joseph R. Weide, defendants in error.

LAMPREYS, MORRIS LAMPREY,
Attorneys for Pl'ff in Error.

UNITED STATES OF AMERICA, *ss:*

To CHARLES WEIDE and JOSEPH R. WEIDE, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the first Monday in December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eighth circuit and district of Minnesota, wherein The Niagara Fire Insurance Company is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 11 day of July, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] R. R. NELSON,
Judge of the Circuit Court of the United States, for the Eighth Circuit and District of Minnesota.

MORRIS LAMPREY, LAMPREYS,
Attorneys for Plaintiffs in Error.

6 (Indorsed:) United States circuit court, district of Minnesota. Cha's Weide et al. vs. Niagara Fire Ins. Co. Citation.

Service of the within citation by copy is admitted at Saint Paul, Minn., July 11th, 1870.

ALLIS, GILFILLAN & WILLIAMS,
Attorneys for Defendants in Error.

Filed July 11, 1870. H. E. Mann, clerk. Lampreys, M. Lamprey, att'ys for pl'ff in error.

7 SCHEDULE.

Circuit court of the United States for the district of Minnesota.

CHARLES WEIDE AND JOSEPH R. WEIDE
vs.
THE NIAGARA FIRE INSURANCE COMPANY.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that, on the 21st day of October, in the year of our Lord one thousand eight hundred and sixty-seven, came the said defendant, by Morris Lamprey and Brisbin & Warner, its attorneys, and filed in the clerk's office of said court a certain return of the clerk of the district court for the county of Ramsey, and State of Minnesota, and order of removal in the words and figures following, to wit:

STATE OF MINNESOTA, *County of Ramsey:*

District court, second judicial district.

8 CHARLES WEIDE AND JOSEPH R. WEIDE *ag'st* THE NIAGARA FIRE INSURANCE COMPANY. } Summons.

The State of Minnesota to the above-named defendant, greeting:

You are hereby summoned and required to answer the complaint of the plaintiffs in the above-entitled action, which has been filed with the clerk of this court, at his office, in the court-house, in St. Paul, in the county aforesaid, and to serve a copy of your answer to the said complaint upon the subscribers at their office, in the city of St. Paul, in the State aforesaid, within twenty days after the service of this summons on you, exclusive of the day of service; and if you fail to answer the said complaint within the time aforesaid, the said plaintiffs will take judgment against you for the sum of two thousand two hundred and fifty dollars with interest thereon from the 25th day of May, A. D. 1867, and the costs of this action.

ALLIS, GILFILLAN & WILLIAMS,
Plaintiffs' Attorneys, St. Paul.

(Endorsed:)

STATE OF MINNESOTA,
County of Ramsey:

I certify and return that I have, on the 16th day of July, A. D. 1867, served the within summons on the within-named defendant by
9 delivering personally to Orrin Curtis, managing agent of said defendant, a true copy thereof at St. Paul, in my county.
Fees $1 40.

D. A. ROBERTSON,
Sheriff of Ramsey County,
By W. G. ROBERTSON, *Deputy.*

4721. District court second judicial district, county of Ramsey. Cha's Weide & Bro. vs. The Niagara Fire Ins. Co. Summons. Filed July 18, 1867. Albert Armstrong, clerk. Allis, Gilfillan & Williams, plaintiffs' attorneys.

STATE OF MINNESOTA,
County of Ramsey:

District court, second judicial district.

CHARLES WEIDE AND JOSEPH R. WEIDE
vs.
THE NIAGARA FIRE INSURANCE COMPANY.

The plaintiffs, for cause of action against the defendant herein, respectfully shows to the court:

That, during all the times hereinafter mentioned, the plaintiffs were and now are citizens and residents of the State of Minnesota, and during said times were copartners in business as merchants at St. Paul, in said State, under the firm-name and style of "Cha's Weide & Bro."

Copy of a writ of error lodged in pursuance of the statute of the United States, in such case made and provided, for the above-named Charles Weide and Joseph R. Weide, defendants in error.

LAMPREYS, MORRIS LAMPREY,
Attorneys for Pl'ff in Error.

UNITED STATES OF AMERICA, *ss:*

To CHARLES WEIDE and JOSEPH R. WEIDE, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the first Monday in December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eighth circuit and district of Minnesota, wherein The Niagara Fire Insurance Company is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 11 day of July, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] R. R. NELSON,
Judge of the Circuit Court of the United States, for the Eighth Circuit and District of Minnesota.

MORRIS LAMPREY, LAMPREYS,
Attorneys for Plaintiffs in Error.

6 (Indorsed:) United States circuit court, district of Minnesota. Cha's Weide et al. vs. Niagara Fire Ins. Co. Citation.

Service of the within citation by copy is admitted at Saint Paul, Minn., July 11th, 1870.

ALLIS, GILFILLAN & WILLIAMS,
Attorneys for Defendants in Error.

Filed July 11, 1870. H. E. Mann, clerk. Lampreys, M. Lamprey, att'ys for pl'ff in error.

7 SCHEDULE.

Circuit court of the United States for the district of Minnesota.

CHARLES WEIDE AND JOSEPH R. WEIDE
vs.
THE NIAGARA FIRE INSURANCE COMPANY.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that, on the 21st day of October, in the year of our Lord one thousand eight hundred and sixty-seven, came the said defendant, by Morris Lamprey and Brisbin & Warner, its attorneys, and filed in the clerk's office of said court a certain return of the clerk of the district court for the county of Ramsey, and State of Minnesota, and order of removal in the words and figures following, to wit:

STATE OF MINNESOTA, *County of Ramsey:*

District court, second judicial district.

8 CHARLES WEIDE AND JOSEPH R. WEIDE *ag'st* THE NIAGARA FIRE INSURANCE COMPANY. } Summons.

The State of Minnesota to the above-named defendant, greeting:

You are hereby summoned and required to answer the complaint of the plaintiffs in the above-entitled action, which has been filed with the clerk of this court, at his office, in the court-house, in St. Paul, in the county aforesaid, and to serve a copy of your answer to the said complaint upon the subscribers at their office, in the city of St. Paul, in the State aforesaid, within twenty days after the service of this summons on you, exclusive of the day of service; and if you fail to answer the said complaint within the time aforesaid, the said plaintiffs will take judgment against you for the sum of two thousand two hundred and fifty dollars with interest thereon from the 25th day of May, A. D. 1867, and the costs of this action.

ALLIS, GILFILLAN & WILLIAMS,
Plaintiffs' Attorneys, St. Paul.

(Endorsed:)

STATE OF MINNESOTA,
County of Ramsey:

I certify and return that I have, on the 16th day of July, A. D. 1867, served the within summons on the within-named defendant by
9 delivering personally to Orrin Curtis, managing agent of said defendant, a true copy thereof at St. Paul, in my county.

Fees $1 40.

D. A. ROBERTSON,
Sheriff of Ramsey County,
By W. G. ROBERTSON, *Deputy.*

4721. District court second judicial district, county of Ramsey. Cha's Weide & Bro. vs. The Niagara Fire Ins. Co. Summons. Filed July 18, 1867. Albert Armstrong, clerk. Allis, Gilfillan & Williams, plaintiffs' attorneys.

STATE OF MINNESOTA,
County of Ramsey:

District court, second judicial district.

CHARLES WEIDE AND JOSEPH R. WEIDE
vs.
THE NIAGARA FIRE INSURANCE COMPANY.

The plaintiffs, for cause of action against the defendant herein, respectfully shows to the court:

That, during all the times hereinafter mentioned, the plaintiffs were and now are citizens and residents of the State of Minnesota, and during said times were copartners in business as merchants at St. Paul, in said State, under the firm-name and style of "Cha's Weide & Bro."

10 That, during all of said times, the defendant was, and now is, a corporation duly incorporated and organized as a fire insurance company, under and by virtue of the laws of the State of New York, and was doing and transacting its business of insuring against loss and damage by fire within the State of Minnesota, and under and by authority of the laws thereof.

That, on the 1st day of February, 1867, at St. Paul aforesaid, in consideration of the sum of twenty-two dollars fifty cents to it then and there paid by the plaintiffs, the defendant did, by its policy of insurance, by it duly executed and delivered to the plaintiffs, insure them in the sum of two thousand two hundred and fifty dollars against loss or damage by fire, for the term of one year from said date, upon their stock of groceries, nails, hollow-ware, and other merchandise contained in the three-story brick building on the south side of Third street, between Minnesota and Robert streets, Saint Paul, Minn.

And for the consideration aforesaid the defendant, in and by said policy, did promise and agree to and with plaintiffs to make good and pay unto them all such immediate loss or damage not exceeding the said sum as should happen by fire to the said property during one year from said day, and to pay the same within sixty days after due notice and proof of said loss made by plaintiffs in accordance with

11 the terms of said policy. That the terms of said policy referred to in said promise were in the following words, that is to say:

"The assured shall forthwith give notice of such loss to the companies, through their general agent, in the city of New York, and as soon after as possible render a particular account of said loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property; giving copies of the written portion of all policies thereof; the actual cash value of the property; their interest therein; for what purpose and by whom the building insured, or containing the property insured and the several parts thereof, were used; when and how the fire originated; and shall also produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the insured) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that assured has, without fraud, sustained loss on the property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify."

And they further say that, after the execution and delivery of said policy, to wit, on the 22d day of Feb., 1867, the building containing the property insured was burned, and the said property so insured

12 was totally destroyed by fire; that the total cash value of the property so insured and so destroyed was, at the time of such destruction, the sum of seventy thousand six hundred fifty-four $\frac{85}{100}$ dollars.

And after said destruction the plaintiffs forthwith gave notice of said loss to defendant, through their general agent in the city of New York; and as soon thereafter as possible, to wit, on the 25th day of March, 1867, they did render to defendant a particular account of said loss, signed and sworn to by them, stating what other insurance had been made on the said property; giving copies of the written portion of all policies thereon; the actual cash value of the property; their interest therein; for what purpose, and by whom the building containing the property insured and the several parts thereof were used; when and

how the fire originated; and did also then produce and deliver to defendant a certificate under the hand and seal of a notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the plaintiffs, stating that he had examined the circumstances attending the loss, knew the character and circumstances of the plaintiffs, and verily believed that they had, without fraud, sustained loss on the property insured to the amount of seventy thousand six hundred fifty-four $\frac{85}{100}$ dollars.

That, at the time of said loss, plaintiffs were the owners of the said property, and there was insurance thereon to the amount of fifty-
13 two thousand seven hundred and fifty-two dollars other than that of defendant hereinbefore set forth.

That more than sixty days have elapsed since the giving of notice, rendering of said account, and production of said certificate as aforesaid, but defendant has failed and neglected, and still does fail and neglect to pay them the amount of said loss, or any part thereof, although since the lapse of said sixty days they have demanded the same from the defendant.

They therefore demand judgment against defendant for the sum of two thousand two hundred and fifty dollars, with interest from the 25th day of May, 1867, with their costs of suit.

ALLIS, GILFILLAN & WILLIAMS,
Pl'ffs' Att'ys, St. Paul.

STATE OF MINNESOTA,
County of Ramsey, ss:

Joseph R. Weide, being duly sworn, says that he is one of the plaintiffs named in the foregoing complaint, and that the said complaint is true of his own knowledge, except as to matters which are therein stated on his information and belief; and as to those matters that he believes it to be true.

JOSEPH R. WEIDE.

Sworn and subscribed before me this 8th day of July, 1867.

E. D. McCLYMONDS,
Notary Public, Ramsey County, Minn.

14 (Endorsed:) No. 4721. District court, Ramsey County. Cha's & Jos. Weide vs. The Niagara Ins. Co. Complaint. Filed July 9, 1867. Albert Armstrong, clerk. Allis, Gilfillan & Williams, pl'ffs' att'ys.

District court, second district.

STATE OF MINNESOTA,
County of Ramsey:

CHARLES WEIDE AND JOSEPH R. WEIDE
against
THE NIAGARA FIRE INSURANCE COMPANY.

And now, the petition of said defendant in this cause for the removal of said cause to the circuit court of the United States for the district of Minnesota for trial having come on to be heard before the court upon such petition, and a bond and security duly approved by this court and filed therein in said cause, and all the papers and

proceedings and the complaint and process in said cause, after hearing Lampreys, attorneys and of counsel for said defendant in favor of said petition, upon due advisement it is ordered herein that said petition be, and the same is hereby, granted; and the said cause above entitled is hereby removed from this court into the next circuit court of the
15 United States to be holden in and for the district of Minnesota, according to the act of Congress in such case provided.

By the court.

W. WILKIN,
District Judge.

July 29th, 1867—11 o'cl'k a. m.

(Endorsed:) No. 4721. Ramsey County district court. Cha's Weide et al. vs. The Niagara Fire Ins. Co. Order.

Due service by copy of the within order is hereby admitted this July 29, 1867.

ALLIS, GILFILLAN & WILLIAMS,
Pl'ffs' Att'ys.

Filed July 29, 1867. Albert Armstrong, clerk. Lampreys & Brisbin & Warner, def't's att'ys, St. Paul.

STATE OF MINNESOTA,
Ramsey County:

I, Albert Armstrong, clerk of the district court second judicial district, for county and State aforesaid, do hereby certify that I have compared the foregoing copies and the original summons, complaint, and order granting removal, and the endorsements thereon, on file, and that the same are correct transcripts thereof, and the whole of the same, and that said originals remain of record in my office.

16 Witness my hand and seal of said court at St. Paul, this 15th day of August, A. D. 1867.

[SEAL.] ALBERT ARMSTRONG, *Clerk.*

[U. S. rev. st., 5 c., cancelled.]

And afterwards, to wit, on the 26th day of December, 1867, came the said defendant, by Messrs. Lampreys and J. B. Brisbin, its attorneys, and filed in the clerk's office of said circuit court its answer to said complaint, which is in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT,
District of Minnesota, ss:

CHARLES WEIDE AND JOSEPH R. WEIDE
against
THE NIAGARA FIRE INSURANCE COMPANY.

The answer of said defendant to the complaint of said plaintiffs in this cause shows to this court and states:

First. The said defendant expressly and specifically denies each and every allegation, statement, matter, and thing, and every part of the same in said complaint contained as therein stated or otherwise, save as hereinafter stated, admitted, or qualified; and said defendant admits that said plaintiffs were citizens and residents of the State

17 of Minnesota, and copartners in business, under the firm-name and style of Cha's Weide & Bro., during the time and as in that behalf stated in said complaint; and said defendant admits that it was, and is, a corporation duly incorporated and organized as a fire insurance company, under and by virtue of the laws of the State of New York, and transacting and doing business of insuring against loss or damage by fire within the State of Minnesota, under and by authority of the laws of said State during the time in said complaint alleged.

Second. And further answering herein, said defendant doth admit, aver, and say that, on or about the 1st day of February, 1866, at Saint Paul, in the State of Minnesota, the said defendant, in consideration of the sum of ten dollars to it then and there paid by said plaintiffs, did, by its certain policy of insurance duly executed and delivered to the plaintiffs, insure them in the sum of one thousand dollars against loss or damage by fire for the term of one year from said day on their stock of groceries, nails, hollow-ware, and other merchandise contained in the three-story brick building mentioned in said complaint, and situated as therein stated, and did agree to make good to the assured, their executors and assigns, all such immediate loss or damage not exceeding in amount the sum insured by said company as aforesaid as

18 should happen by fire to the said property during one year from said day, to be paid sixty days after due notice and proofs of the same made by the assured, and received at the office of the general agency of the said company in the city of New York, in accordance with the terms of said policy; that said policy provided, and it was covenanted and agreed therein and thereby by said parties among other things, that is to say, "That said company should not be liable for loss by theft at or after a fire;" and that any false representations by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in a written application or otherwise should avoid said policy, and then and in every such case said policy should be void; and that in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of said policy, the assured should be entitled to recover of said company no greater proportion of the loss sustained than the sum thereby insured should bear to the whole amount insured thereon, whether such other insurance be by specific or by general or by floating policies; that, in case of loss, the assured should forthwith give notice of said loss to the company through their general agent in the city of New

19 York, and as soon after as possible render a particular account of said loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies therein, the actual cash value of the property, their interest therein, for what purpose, and by whom the building insured, or containing the property insured, and the several parts thereof were used; when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the insured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify; and that the assured should, if required, submit to an examination, under oath, by any person

appointed by the company, and, if deemed necessary by the company, to a second examination, and subscribe to such examinations when reduced to writing; and shall also produce their books of account and other vouchers, and all property thereby insured, whether damaged or not damaged, and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for ex-
20 amination to any person named by the company. And until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable; all fraud or attempt at fraud, or false swearing on the part of the assured, shall cause a forfeiture of all claims under this policy; and that if reinsurance should be thereby made for any other insurance company, to be on a basis of such a liability, that, in the event of loss, this said company should pay only its proportion of said loss pro rata with said other company as the amount reinsured by such other company; and that said policy was made and accepted by said parties upon the express terms and conditions above and therein stated. And that said policy was renewed and continued in force by said company on or about the 1st day of February, 1861, for one year, and until the 1st day of February, 1868, in consideration of the premium duly paid to it by said plaintiffs therefor, and by indorsement on said policy, on or about January 31st, 1867, in consideration of the cash premium to it paid by said plaintiffs therefor, the additional sum of one thousand and two hundred and fifty dollars was insured upon said stock described in said policy by said company upon the same terms and conditions as therein stated.

And that, after the execution and delivery of said policy
21 of insurance, to wit, on or about the 22d day of February, 1867, the said building was mostly burned, but as to whether said property or any of the same so insured was totally or partially, or to what extent the same, or any of the same, was destroyed by this fire, then or there or at any time or place, said defendant has not any knowledge or information thereof sufficient to form a belief; but said defendant expressly denies that the actual cash value, of such property at the time of, or at or about the time of such fire or alleged loss, was seventy thousand and fifty-four $\frac{5}{100}$ dollars, or any greater sum than twenty thousand dollars in all.

And further answering, said defendant admits, avers, and says herein that, on or about the 19th day of March, 1867, said plaintiffs gave notice thereof to said defendant, and rendered to it an account of their loss, under oath, stating the time of the fire, occupancy of the building aforesaid at the time of the fire, and what other insurance was on said property; copies of other policies of insurance thereof; what they pretended to be the whole value of the property, and the amount of loss or damage thereto; and did produce and deliver to it the certificate, under seal of a notary public mentioned in said complaint, containing the statements therein mentioned; but said defendant denies that said notice or proofs were at any time or place satisfactory to said company,
22 or true or correct; that said defendant has not any knowledge or information thereof sufficient to form a belief as to whether or not said plaintiffs were at the time of said fire, or at any time, the owners of the said property, or any, or what part, if any, of the same. And said defendant admits, avers, and says that the whole sum insured upon said property was, and the said plaintiffs were, insured thereon at the time of said fire and alleged loss in the further and additional sum of $52,350 over and above that of the said defendants above stated; and that more than sixty days have elapsed since the alleged service of said

notice and proofs, and that payment thereof has been demanded of said defendants, and that the same has not been paid.

Third. And further answering in this case, and for a further defence therein, said defendant charges the facts to be, alleges and avers that, heretofore, to wit, on or about March 19, 1867, and on or about March 30, 1867, and on or about April 3, 1867, and at different times subsequent to the date of the commencement of this action, at St. Paul, said plaintiffs, and each of them upon his oath, and when not upon oath, wilfully, falsely, and fraudulently, and with intent to cheat and defraud said defendant, stated and represented to said company, this defendant, and to the Hartford Insurance Company and its agents, as follows, to wit: that
23 the amount and value of the property aforesaid belonging to them, the said plaintiffs, and so insured as aforesaid, and which was totally destroyed by said fire, was the sum of $70,654 85 at the time of said fire, when in fact the same was not more than $20,000; that the amount of their goods on hand Feb. 28, 1865, as the primary basis of their claim against said defendant thereon, was $47,561 87, when in truth the same was only $25,400 87, then and there; that two of the companies which had insurance upon said property at the time of said fire, the Phœnix and City Fire Insurance companies, the former having had a policy of $5,000, and the latter a policy of $3,000 upon said property, then and there had paid the full amount of their policies to said plaintiffs with a slight discount, when in fact both of said companies had been allowed a discount of 46 per cent. upon the policies by said plaintiffs; and further, that said plaintiffs had represented no other or different basis for settlement to any of the companies interested in their loss by said fire than that stated to said Hartford as above mentioned, when in truth said plaintiffs had at that time represented and given to the Phœnix, City Fire, Ætna, and Underwriters' Insurance companies, seven of said companies, and each of them, a basis of settlement more than $40,000 below that represented and stated by said plaintiffs
24 to the said Hartford Co. as aforesaid; and further, that said plaintiffs greatly overstated the amount of goods purchased by them in the year 1866, and during the year preceding the fire; and further, the said plaintiffs greatly understated the amount of their sales during the year 1866, and the year preceding the fire, and stated and represented to said defendant and said companies that they had on hand in said building at the time of the fire aforesaid, divers and sundry goods of which they had none on hand whatever then or there; and said plaintiffs have wilfully and grossly misrepresented the facts respecting such fire and loss required by said policy to be stated by them. And the said defendant avers that said plaintiffs, and each of them have and did, wholly refused to answer questions relating to the said loss propounded to them by the agent of said company and this defendant, as required by the terms and conditions of said policy as above stated, and about the last of March or first of April, 1867; and that said plaintiffs have so made such statements and representations and done such acts and things as aforesaid knowing the same to be false and fraudulent and with intent to defraud said defendant as aforesaid, and that thereby and by reason thereof all claim under said
25 policy is forfeited and made null and void by the terms thereof; all of which facts above stated said plaintiffs had full notice and knowledge.

Said defendant therefore denies that it is indebted to said plaintiffs or either of them in any sum or for any cause.

Wherefore said defendant demands judgment against said plaintiffs

herein, that said plaintiffs take nothing by this action; that said policy be ordered to be given up and cancelled, and for the costs and disbursements of this action.

LAMPREYS AND J. B. BRISBIN,
Defendant's Attorneys, St. Paul, Minn.

STATE OF MINNESOTA,
County of Ramsey, ss:

O. Curtis came before me personally and being duly sworn doth say that he is the agent of and an officer of said defendant, which is a corporation, in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to the matters which are therein stated on his information or belief; and as to those matters that he believes it to be true.

O. CURTIS.

Subscribed and sworn to before me on this 26th day of Dec. A. D 1867.

J. N. CARDOZO,
U. S. Commissioner Dist. of Minn.

26 And afterwards at a stated term of said court begun and held at the city of St. Paul, in said district, on the 3d Monday, being the 20th day of June, A. D. 1870, on the first day of said term, the following proceeding, among others, was had, to wit:

CHARLES WEIDE ET AL.
vs.
THE GERMANIA INS. CO.

CHARLES WEIDE ET AL.
vs.
THE HANOVER FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE NIAGARA FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE REPUBLIC FIRE INS. CO.

Ordered that these four cases be tried together before the same jury, separate verdicts being rendered in each case, the attorneys for the respective parties in such suits being present and consenting thereto in open court.

27 And afterwards, on the fourth day of said term, the following proceedings, among others, were had, to wit:

CHARLES WEIDE ET AL.
vs.
THE GERMANIA FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE HANOVER FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE NIAGARA FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE REPUBLIC FIRE INS. CO.

These causes coming on to be heard, the several parties appeared, by their respective attorneys, and a jury being called to try the issues therein, came, to wit: Jeremiah Russell, J. A. Ellison, J. C. George, Thomas Frost, T. J. Lake, S. J. Johnson, D. Wallen, John Thompson, John O'Gorman, T. M. Newson, Charles Judson, and John Little, who are duly empan'elled and sworn to try the issues in said cases, and true verdicts give according to the evidence.

28 The case is opened on the part of the plaintiffs by James Gilfillan, esq., their attorney.

JOSEPH WEIDE is sworn and examined as a witness for the plaintiffs.

And afterwards, on the fifth day of said term, the following proceedings, among others, were had to wit:

CHARLES WEIDE ET AL.
vs.
THE GERMANIA FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE HANOVER FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE NIAGARA FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE REPUBLIC FIRE INS. CO.

These causes coming on to be further heard, and the jury heretofore empan'elled and sworn herein being called, came. Charles Weide, H. L. Williams, Louis Krieger, and William Petters, are sworn and

29 examined as witnesses for the plaintiffs.

And here the plaintiffs rest their cases.

Cases opened on the part of the defendant by Morris Lamprey, their attorney.

Durand, S. S. Eaton, and Theodore Bomp are sworn and examined as witnesses for defendants.

And afterwards, on the sixth day of said term the following proceedings, among others, were had, to wit:

CHARLES WEIDE ET AL.
vs.
THE GERMANIA FIRE INS. CO.
AND

THE HANOVER FIRE INS. CO.
AND
THE NIAGARA FIRE INS. CO.
AND
THE REPUBLIC FIRE INS. CO.

These causes coming on to be further heard, and the jury heretofore empan'elled being called, came.

Bartlett Presley, P. Kelley, P. F. McQuillan, J. M. Bohrer, Thomas Howard, John Turner, J. W. McClung, and John Holland are sworn and examined as witnesses for the defendants.

And here the defendants rest their cases.

30 Joseph Weide and Charles Weide recalled and examined as witnesses for the plaintiffs.

And here the respective parties, plaintiffs and defendants, rest.

And afterwards, on the seventh day of said term, the following proceedings, among others, were had, to wit:

CHARLES WEIDE ET AL.
vs.
THE GERMANIA FIRE INS. CO.
AND
THE HANOVER FIRE INS. CO.
AND
THE NIAGARA FIRE INS. CO.
AND
THE REPUBLIC FIRE INS. CO.

These causes coming on to be further heard, the several parties, by their respective attorneys, appear, and the jury heretofore empan'elled and sworn to try the issues therein, being called, came.

Mr. Storrs sums for the defendants.

Lorenzo Allis, esq., sums up for the plaintiffs.

Charge is given the jury by the court, and they retire in charge of an officer duly sworn and qualified to attend them.

31 And afterwards, on the eighth day of said term, the following proceedings, among others, were had, to wit:

CHARLES WEIDE ET AL.
vs.
THE NIAGARA FIRE INS. CO.

And now the jury heretofore empannelled and sworn to try the issues in the above-entitled cause, being returned into court, present to the court their verdict in writing; which is in the words and figures following, to wit:

We, the jury empannelled to try the case of Charles Weide et al. vs. The Niagara Fire Insurance Company, render the following verdict: For the plaintiffs in the sum of two thousand two hundred and fifty dollars, with interest, at the rate of seven per cent., from the 19th day of May, 1867, to June 28th, 1870, four hundred and ninety dollars and

thirty-four cents—total, two thousand seven hundred and forty dollars and thirty-four cents, ($2,740 34.)

THOMAS M. NEWSON, *Foreman.*

Whereupon the defendant, by its attorneys, made a motion for a new trial, which was, after argument, submitted to the court, and by the court denied.

32 And afterwards, and on the twelfth day of said term, the following proceeding, among others, was had, to wit:

CHARLES WEIDE ET AL.
vs.
THE NIAGARA FIRE INS. CO.

And now come the plaintiffs, by Messrs. Allis, Gilfillan & Williams, their attorneys, and move the court that judgment be rendered upon the verdict of the jury heretofore found and rendered by the jury empannelled to try the issues joined in this cause.

Whereupon it is by the court ordered and adjudged that the plaintiffs do have and recover of and from the defendant the sum of two thousand seven hundred and forty dollars and thirty-four cents, (being the amount of the verdict of the jury heretofore found and returned herein in favor of the plaintiffs,) besides the costs and disbursements of the plaintiffs by them in and about this suit in this behalf expended, to be taxed, and that the plaintiffs have execution therefor.

And afterwards, to wit, on the 2d day of July, A. D. 1870, the said defendant, by its said attorneys, filed in the clerk's office of said
33 court its bill of exceptions, duly allowed, signed, and sealed, in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States of America for the district of Minnesota.

CHARLES WEIDE AND JOSEPH R. WEIDE
vs.
THE NIAGARA FIRE INSURANCE COMPANY.

Be it remembered that on the trial of this cause, which came on for trial before this court, at the general term thereof, on the 23d day of June, A. D. 1870, the honorable the judges, Samuel F. Miller and John F. Dillon, presiding, a jury was duly empan'elled and sworn to try this cause.

And to maintain the issues on their part, the plaintiffs introduced evidence tending to show that, at the fire mentioned in the complaint, all the books and papers of the plaintiffs were destroyed, except one ledger, commencing Oct. 1, 1866, and continued to Feb. 22, 1867, the time of the fire, and two day-books, commencing May 31, 1865, and continuing to Feb. 22, 1867; that said day-books contained the original entries of the purchases and of the sales of merchandise made by plaintiffs during the period covered by said day-books; that during said period plaintiffs kept no clerk; that such entries were
34 made by one or the other of the plaintiffs at the time of the transactions so entered, and each of the plaintiffs testified that such entries

made by him were truly and correctly made; that one of the plaintiffs, upon being sworn as a witness for plaintiffs on the trial, could state from his recollection the amount and value of their stock on hand at the time of, and destroyed by, the fire; and the other plaintiff, upon being so sworn could not state the amount or value thereof from his recollection; and neither of the plaintiffs could state from his recollection the amount or value of their stock when they took their last inventory, to wit, on the 28th February 1866, nor the amount of their sales or purchases of merchandise from the taking of such inventory to the time of the fire; that the entries in said ledger were made by one or the other of said plaintiffs, and each of them testified that such entries made by him were correctly made, and consisted of postings from said day-books, and at the time of the transactions referred to in such entries, except the first entry in said ledger on the debit side of the merchandise account therein, concerning which item plaintiffs introduced evidence tending to show that it was an item correctly transferred by one of the plaintiffs from an exhausted ledger destroyed by the fire to the present ledger, and
35 that the item so transferred was the balance on the debit side of the merchandise account in said exhausted ledger; that the entries in said exhausted ledger were correctly made by one or the other of the plaintiffs at the time of the transactions so entered, and that the footings and balances therein were correct, each of the plaintiffs testifying that such entries, footings, and balances made and footed by him were correctly made and footed.

And further to maintain the issues on their part, plaintiffs introduced evidence tending to show that they took an inventory of their stock on the 28th day of February, 1866; that said inventory was correctly taken, and at the same time correctly reduced to writing by one or the other of the plaintiffs in an inventory-book kept by them for such purpose; that the prices or values therein were correctly stated and correctly footed up in said book at the time, and that at the same time one of the plaintiffs correctly entered said footing and other footings upon the fly-leaf of said exhausted ledger, and that afterwards one of plaintiffs correctly transferred such footings to the fly-leaf of the present ledger on or after Oct. 1, 1866; that neither of plaintiffs could state from his recollection the amount of such inventory or of such footings.

And further to maintain the issues on their part the plaintiffs offered in evidence the said entry upon the said fly-leaf of said
36 ledger, which is in the words and figures following, to wit:

"1866, Feb'y 28.

"Merchandise		$74,520 74
		39,169 64
		900 00
		396 60
		$114,986 98
"Liabilities		$56,656 29
		$58,330 69"

Whereupon defendant objected to the said memorandum of said fly-leaf, upon the grounds that the same had not been properly verified; that no foundation had been laid for introducing the same, or any part

of the same, because the same, and every part of the same, were declarations of parties in their own favor, and incompetent and immaterial.

The court overruled each of the objections and received the same in evidence; to which ruling of the court the defendant then duly excepted, and, by request of the defendant, its exceptions were duly noted and allowed by the court at the time.

And further to maintain the issues on their part, the plaintiffs thereupon offered in evidence the said first item on the debit side in their present ledger of said merchandise account therein; which first item of said merchandise account was as follows, to wit:

37 "Merchandise ac., page 63:
"1866, Oct. 1st. To am't forward || 36 || 77,538 16."

To which the defendant then and there objected, upon the grounds that there was no foundation laid for introducing the same, or any part of the same, because the same has not been duly verified, and because the same, and every part of the same, were declarations of a party in his own favor, and were incompetent and immaterial.

The court overruled each of the objections and received the same in evidence. The defendant then duly excepted to said ruling of the court, and, by request of the defendant, its exceptions were duly allowed and noted by the court at the time.

The above-recited facts in the memorandum of evidence bearing on the subject being as hereinbefore stated, the plaintiffs offered in evidence the said merchandise account in said ledger contained:

Whereupon the defendant objected to the introduction of the same in evidence, upon the grounds that the same had not been duly verified; that no foundation had been laid for introducing the same; because the same, and every part of the same, were statements of a party in his own favor, and incompetent and immaterial; that the court overruled the defendant's objections and received the same in evidence; to which ruling of the court the defendant then and there excepted,
38 and, by request of defendant, its exceptions thereto was duly allowed and noted by the court at the time.

There being evidence tending to show that the real loss of plaintiffs was far less than the total amount of insurance made by this defendant, and certain other insurance companies having insurance on the plaintiffs' stock of merchandise; and also that plaintiffs had made certain settlements at the rate of fifty-four cents on a dollar with certain of said other insurance companies having such insurance on said stock; and that on an examination of plaintiffs before this action was commenced, under oath required by defendant of plaintiffs, under the conditions of said policy, the plaintiffs disclosed the fact that they had made such settlements with such other companies having insurance on said stock, but on such examination refused to answer questions put to them by defendant as to the amounts for which they made such settlements; and it appearing by the policy that the following conditions were contained therein, to wit:

"In case of loss the assured shall use their best endeavors in saving and protecting the property from damage at and after the fire. If they shall fail so to do the companies will not be liable for damage caused by such failure, and there can be no abandonment to the companies
39 of the property insured. The assured shall forthwith give notice of said loss to the companies through their general agent in the

city of New York, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon, the actual cash value of the property, their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used; when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, nearest to the place of the fire, (not concerned in the loss as a creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured, to the amount which such magistrate, notary public, or commissioner of deeds shall certify; and the assured shall, if required, submit to an examination under oath, by any person appointed by the companies, and, if deemed necessary by the companies, to a second examination, and subscribe to such examinations when reduced
40 to writing; and shall also produce their books of account and other vouchers, and all property hereby insured, whether damaged or not damaged; and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for examination to any person named by the companies. Damage to property not totally destroyed shall be appraised by disinterested men mutually chosen by the assured and the companies; and the companies preserve the right to take the articles damaged at their appraised value. When personal property is damaged the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers, in writing, shall form a part of the proofs hereby required; one-half the appraisers' fees to be paid by the companies. In case of loss on property held in trust or commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, with their respective interests therein certified to by them. If this policy is made payable in case of loss to a third party, or held as collateral security, the
41 proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. And until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. All fraud, or attempt at fraud, or false swearing on the part of the assured shall cause the forfeiture of all claim under this policy."

The defendant moved the court, before the jury had retired, to instruct the jury as follows, that is to say:

"If the jury shall believe that the plaintiffs, or either of them, in the course of an examination on oath, under the policy, refused to answer any questions by which defendant could fairly estimate or reasonably infer plaintiffs' real loss in the insured property, and have not before the commencement of this action answered said questions under oath, then the jury must find for the defendant."

Which motion or request the court wholly refused to give in substance or effect; to which ruling of the court and refusal to charge, the defendant then and there duly excepted, and, by request of defendant, its exception thereto was duly allowed and noted by the court at the time.

There being evidence tending to show that the plaintiffs were requested to produce duplicate bills of purchases, the facts in evidence,
42 so far as applicable, being as recited in the statement made in the above fourth exception of the defendant, the defendant before the jury had retired, moved the court to instruct the jury as follows, to wit:

"If the jury believe from the evidence, that the plaintiffs were requested by the defendants to produce duplicates of invoices of goods purchased by them, the originals of which were alleged by them to be destroyed, and neglected to do so before the commencement of this action, their right of action never accrued and the jury must find for the defendant."

Which motion or request the court wholly refused to give in substance or effect; to which ruling of the court and refusal to charge, the defendant then and there duly excepted, and, by request of defendant, its exception thereto was duly allowed and noted by the court at the time.

The testimony of the plaintiffs given in evidence before the jury tending to show material discrepancy from material statements made by them in their proofs of loss and their examination on oath under the policy, the requirements of the policy being as hereinbefore set forth in the recital of facts made in the memorandum attached to the fourth exception, the defendant moved the court to instruct the jury as follows, to wit:

"If the jury shall believe that the plaintiffs testifying on this trial
43 have made statements materially differing from statements knowingly made under oath in their proofs of loss, whether in their particular account made to the defendant, or any examination on oath submitted to by them, under the terms of the policy, this is false swearing, and the jury must find for the defendant."

Which motion or request the court wholly refused to give in substance or effect; to which ruling of the court and refusal to charge, the defendant then and there duly excepted, and, by request of the defendant, its exception was duly allowed and noted by the court at the time.

In the examination on oath made by the plaintiffs under the policy, the condition of the policy being as set forth in the recital of facts accompanying the above fourth exception, the plaintiffs having stated the outstanding debts of the plaintiffs to be between eighteen thousand dollars and twenty thousand dollars, and the plaintiffs having stated in evidence before the jury that their indebtedness did not exceed eight thousand dollars at the time of the fire, and there being evidence tending to show that plaintiffs knowingly made the statement in said examination on oath, and subscribed and made oath to the same, the defendant moved the court to instruct the jury before they retired as follows, to wit:

"In their examinations under the policy, plaintiffs seem to have
44 sworn that the outstanding debts of their firm amounted to between eighteen thousand dollars and twenty thousand dollars, at the time of the fire. In their testimony here they state positively that their indebtedness did not exceed eight thousand dollars at that time; if the jury shall believe that they knowingly made the statement set forth in their examination on oath and subscribed and made oath to the same, the jury must find for the defendants."

Which motion or request the court wholly refused to give in sub-

stance or effect; to which ruling of the court and refusal to charge the defendant then and there duly excepted, and, by request of the defendant, its exception was duly allowed and noted by the court at the time.

And the defendant having put in evidence the entry on said fly-leaf for the year 1865, to show what said fly-leaf stated the plaintiffs' outstanding debts to be the last of Feb., 1865, when the plaintiffs claimed to have taken an inventory thereof, of which plaintiffs testified the said entry on said fly-leaf for the year 1865 showed the footings, and the said entry on the said fly-leaf for the year 1865, being in the words and figures following, to wit:

"1865.			
	" Merchandise	$47,561	87
45	" Book accounts & notes & cash	30,927	62
	" Real estate	900	00
" Store fixtures		396	60
		" $79,786	09
" Liabilities		27,140	51
		" $52,645	58"

And the plaintiffs having testified that the profits on their sales for the year ending Feb. 28, 1866, were nine per cent.; the defendant moved the court to instruct the jury before they retired as follows, to wit:

"It is for the jury to determine from all the facts and circumstances in the case whether the plaintiffs had on hand, on the 28th day of February, 1866, goods to the amount of $74,520, as shown by the fly-leaf of their ledger. In ascertaining the correctness of that entry on the fly-leaf, it is proper for the jury to take into the account, as a basis for their calculations the amount of merchandise shown by the fly-leaf, and claimed by the plaintiffs to have been on hand on the 1st day of March, 1865; to such amount should be added the purchases made during the year, and from this sum should be substracted the sales, less the profits. If the jury believe, from the evidence in the case, that, on the 1st day of March, 1865, the plaintiffs had on hand, as shown by the fly-leaf, the
46 sum of $47,561 87; that their purchases did not exceed the sum of $135,000 for the year ending Feb. 28, 1866; that the sales during the same period of time were $152,000, and that the profits on the sales were nine per cent. the incorrectness of the entry upon the fly-leaf would be thereby established, and the plaintiffs could have had on hand, on the 28 of Feb'y, 1866, no larger amount of merchandise than would be shown by deducting the amount of sales, $152,000, less the profits, at nine per cent., from the total of merchandise on hand March 1, 1866, and the purchases during the year."

Which motion or request the court wholly refused to give in substance or effect; to which ruling and refusal of the court to charge, the defendant then and there duly excepted, and, by request of defendant, its exception was duly allowed and noted by the court at the time.

And the defendant thereupon moved the court, before the jury had retired, to instruct the jury as follows, that is to say:

"In ascertaining the amount of merchandise which the plaintiffs had

on hand at the time of the fire, it is proper for the jury to take, as the basis of their calculations, the amount actually on hand on the 28 Feb'y, 1866. In determining what that amount actually was the jury
47 are not bound by the fly-leaf of the ledger; but if the jury believe, from calculations made by them based upon the stock on hand March 1, 1865, and the purchases, sales, and profits upon sales made during the year following, that the goods on hand March 1, 1866, amounted to only about $40,000, then the jury should take such sum as the basis of their calculations, and arrive at a conclusion of the merchandise on hand at the time of the fire, by the same process adopted in ascertaining the amount of merchandise March 1, 1866."

Which motion or request the court wholly refused to give in substance or effect; to which ruling of the court and refusal to charge, the defendant then and there duly excepted, and, by request of the defendant, its exceptions were duly allowed and noted by the court at the time.

And now the counsel for the defendant, upon the trial of said case, having duly excepted and prayed that this bill of exceptions should be duly signed and allowed, and the same having been examined and found to be true, the foregoing bill of exceptions, at the request of the said counsel for the defendant, is hereby allowed, signed, and sealed.

SAM. F. MILLER, *Judge.* [SEAL.]

48 And afterwards, to wit, on the eleventh day of July, A. D. 1870, on application of said defendant, by Mess. Lampreys & John B. Brisbin, its attorneys, to the Honorable Rensselaer R. Nelson, one of the judges of said court, at his chambers in the city of St. Paul, in said district, an allowance of a writ of error was made, in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT,
District of Minnesota, ss:

CHARLES WEIDE AND JOSEPH R. WEIDE
ag't
THE NIAGARA FIRE INSURANCE COMPANY.

And now, upon filing the security approved by me in this cause, upon application of the defendant, the writ of error to the Supreme Court therein, is allowed.

July 11, A. D. 1870.

R. R. NELSON,
U. S. Dist. Judge.

49 UNITED STATES OF AMERICA,
Circuit Court of the United States, District of Minnesota, ss:

I, H. E. Mann, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing is a full, true, and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause; and also of the bill of exceptions filed therein, as appears from the original files and records of said court; and I do further certify and return that I have annexed to said transcript, and do hereby transmit therewith the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, at Saint Paul, in the district aforesaid, this 11th day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth year.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. Minn'a.

(Indorsed:) Charles Weide et al. vs. The Niagara Fire Ins. Co. Return to writ of error.

(Indorsement on cover:) No. 376. The Niagara Fire Insurance Company, plaintiff in error, vs. Charles & Joseph R. Weide. Minnesota C. C. U. S. Filed 10th December, 1870.

In the Supreme Court of the United States.

REPUBLIC FIRE INSURANCE CO. *vs.* CHARLES AND JOS. R. WEIDE.	No. 169.
HANOVER FIRE INSURANCE CO. *vs.* SAME.	No. 170.
GERMANIA FIRE INSURANCE CO. *vs.* SAME.	No. 171.
NIAGARA FIRE INSURANCE CO. *vs.* SAME.	No. 172.

These causes come up by writ of error to the Circuit Court of the United States for the District of Minnesota.

Though there were four different actions and four judgments, they were tried as one case, and the four records are identically the same, excepting only the names of the plaintiffs in error.

The Pleadings.

The action was commenced in the State court, second judicial district of Minnesota, July 18, 1867, (Record, p. 3,)

and removed July 29, 1867, to the Circuit Court of the United States by the defendant. Record, pp. 5, 2.

THE "COMPLAINT" avers that the defendant on the 1st of February, 1867, in consideration of $22 50 insured the plaintiffs in the sum of $2,250 against loss by fire for one year on their stock of goods. It sets forth the conditions contained in the policy as to proof of loss, and avers performance thereof. It further avers, that besides the amount insured on the stock of goods by defendants, there was other insurance to the amount of $52,750, making in all—$52,750 plus $2,500—$55,250, and avers the loss to have been $70,654. Record, pp. 3, 4, 5.

[The purpose of stating the other insurance was to meet the proviso in the policy that each insurer should contribute only in proportion with all other insurers, and by showing that the loss exceeded the total insurance, it made a case of total loss.]

THE ANSWER placed the defence upon several grounds, of which it is only necessary to state two, which are involved in the exceptions. Rec., pp. 6 to 9.

1. That the loss was overstated, and instead of being upwards of $70,000, it did not exceed $20,000.

2. That the policy required the plaintiffs in case of loss to submit to an examination by the defendant as to the amount and circumstances of the loss, and until they should so submit, the loss was not payable, and that the plaintiff had refused to submit to such examination, in effect, by refusing when examined to answer certain questions pertinent and material to the matter in question.

EXCEPTIONS.

So far as we can gather from the bill of exceptions, it appears that the plaintiffs kept no clerk or bookkeeper, but took their inventories, made the entries in their books, and posted their books themselves; this though they claimed to

have sold in one year, goods to the amount of $152,000, or $500 a day, out of a miscellaneous stock of "groceries, nails, hollowware and other merchandise." The only evidence offered by the plaintiffs, so far as the bills of exception show, was the testimony of the plaintiffs themselves, and their books, which were admitted in evidence. It was against the admissibility of these last that the chief exceptions were directed.

The First Exception

is to the admissibility of an entry on the fly-leaf of the ledger, made there under the following circumstances, as shown in the bill of exception. (Record, p. 14.)

The plaintiffs took an inventory of their stock of goods on the 24th of February, 1866, a year before the fire, which was entered in a book. The various items were footed up in that book, and the sum was entered in that book, and at the same time was entered on the fly-leaf of a ledger. In October following, the said footing was "transferred" [that is copied] on to a fly-leaf of another ledger. The inventory book and the first named ledger being destroyed, and neither plaintiff being able to state from recollection the amount of the inventory, but testifying that the inventory was correct, the footing correct and the copy correct, the plaintiffs were permitted to put in evidence the copy of the footing on the fly-leaf of the ledger, to show the amount of the said inventory.

We submit that this ruling is erroneous.

The rule is that such an entry or memorandum is not *per se* evidence in any case of the facts stated in it, and can only be used in connection with the testimony of a witness, who with its aid, can testify either that he now remembers the facts therein stated; or that he saw the paper when he remembered the fact that he then knew the fact to be correctly stated in the paper.

It is only the original that can be referred to by a witness for the latter purpose.

1 Greenl. Ev., 436.

1 C. and H., notes to Phillips' Ev. p. 441, N. 273.

2 ibid, p. 456, N. 252, p. 726, N. 377, and cases cited.

THE SECOND EXCEPTION.

It is stated that the plaintiff was allowed to offer in evidence the following entry in their ledger:

Merchandize.

1866. Oct. 1. To amount forward..... $77,538 16

(Rec. p. 14.)

That is to say, they offered a copy of an entry made in another book.

We submit this ruling is liable to the same objection as that last above referred to.

THE THIRD EXCEPTION.

The plaintiffs then offered in evidence the merchandize account in the ledger.

In no possible view, we submit, was this account evidence in itself of the facts therein stated. It was a statement made by the plaintiffs, one or both, in writing that they had bought merchandize to a certain amount.

And the bill of exceptions states that that writing was admitted in evidence. We submit this was error.

It was not a book of original entry, but a compilation taken and copied from another book, and it does not come within the rule, which in some cases admit books of original entry as evidence, and is confined to such books.

1 C. and H., notes Phillips' Ev., p. 297, N. 201.

On another ground, too, the admissibility of such evidence may be contested.

The issue was the *value* of the goods at the time of the fire. The offer was to prove what they cost at a period prior to the fire, and some of them included in the "amount brought forward," at a very long period prior to the fire. It was not admissible to prove the *cost*.

THE FOURTH EXCEPTION.

By the policy, the plaintiffs, after furnishing proof of loss, were bound, if required, "to submit to an examination," and it was a condition in the policy that until they should have submitted to such examination *the loss should not be payable.*

There being evidence that the plaintiffs had been required to submit to an examination, had appeared, but refused to answer questions upon a certain matter, the defendants asked the court to instruct the jury, that if on such examination, the plaintiffs "refused to answer any questions by which defendant could fairly estimate or reasonably infer plaintiffs' real loss in the insured property, and have not before the commencement of this action answered said questions under oath, then the jury must find for the defendant." (Rec., p. 16.) Which the court refused.

The propriety of this instruction as an abstract proposition can hardly be questioned. And we presume the refusal proceeded on the ground that no proper foundation was laid for the instruction. We proceed to examine this.

It appeared in the pleadings, averred by both plaintiffs and defendant, that there were other policies on the property, amounting in all to $55,252, and these were bound to contribute ratably to the loss.

On the trial, evidence was given to show that the real loss of plaintiffs was far less than the amount of insurance, and that upon the examination of the plaintiffs under the policy, before suit brought, they disclosed the

fact that they had settled with other insurance companies at fifty-four cents on the dollar, but "refused to answer questions put to them by defendant as to the amount for which they made such settlements." Rec., p. 15.

We are then to inquire whether the plaintiffs were right in refusing to answer those questions, or, in other words, whether such questions were proper.

1. The examination provided for was in its nature a cross-examination. The policy provided that the assured should state the amount of his loss, claimed against the insurer, and produce proof of the loss, and should then submit to examination. The only possible object of this examination was to test the correctness of the demand made and the reliability of the preliminary proofs put in. And such testing is in its nature cross-examination.

Was then the question a proper one to be asked on cross-examination?

2. We have in this case several insurers bound to the insured, to contribute ratably towards his loss. They are not jointly liable, (for then there could be no question,) but they are severally liable.

The plaintiff having testified in the private examination that his loss was so much in amount, is asked how much he has received from those other insurers who are bound with defendant. Suppose there were but two insurers, each bound to pay one-half, (the principle is the same), the plaintiff has collected from one, and he is asked, in effect, what he represented or computed his loss to be when he claimed from the other insurer.

It is true the above is not shown to be precisely the form of the examination of the plaintiff. We are told only that the plaintiffs "refused to answer questions put to them *as to the amounts* for which they made *such* settlements." Rec., p. 15. But we submit that "the amounts" in question could only have been the amount of loss. But

even if "the amount" meant the amount of payment by the insurer, still as the plaintiffs disclosed the fact that they had settled at fifty-four cents on the dollar, the amount paid would, by calculation, have determined the amount of loss agreed on.

Then the case is this: The plaintiffs, in their preliminary proofs, computed their loss, being the basis of their demand against this defendant, at $70,000.

On a previous occasion they had made a computation of the same loss as the basis of their demand against another company bound by a similar contract.

Was it not perfectly legitimate to ask the plaintiffs if they had not previously stated their loss, and what that statement was? Is this not in effect the very common question put to a witness, whether he has not on a former occasion made a different statement on the same point?

We submit that the bill of exceptions shows that the defendant in that examination was pursuing a proper line of inquiry, and if not arrested by the refusal of the plaintiff to answer, might have followed up the questions with others more obviously pertinent and material. It seems from the answer that one of the considerations which led the defendant to resist the demand, was the belief that the plaintiffs had settled with other companies on the basis of a loss of $30,000 only, instead of $70,000. The defendants had a right to inquire into this and satisfy itself as to the fact.

The Fifth Exception.

It was provided in the policy that the assured *should*, in case of loss, *produce their books of account and other vouchers, and should also produce certified copies of all bills and invoices, the originals of which have been lost.* (Rec., p. 5.)

And that *until such proofs, declarations, and certificates are produced * * the loss shall not be payable.* (Rec., 6.

The defendants gave evidence to show that it had requested the plaintiffs to produce such copies, and asked the court to instruct the jury that if the plaintiffs had neglected to comply with such request, the right of action never accrued; which the court refused.

We submit that the instruction should have been given.

It was a part of the contract that the copies should be furnished, and that until furnished, the defendant should not be required to pay the loss, and until the loss became *payable*, the plaintiffs could not maintain the action.

No excuse seems to have been offered, and the question rests solely upon the effect of a condition agreed to by both parties and not performed by the plaintiffs.

The Sixth Exception.

The instruction asked in this exception was to declare as matter of law, that if the plaintiffs' testifying on this trial, contradicted material statements made by them knowingly under oath in their proofs of loss, then this was false swearing and the jury must find for the defendant.

This was based on a provision of the policy, that all false swearing should cause a forfeiture of all claim under the policy. (Rec., p. 16.)

Understanding the proposition to be that it should be found that the plaintiffs had knowingly made on two different occasions, under oath, statements materially different as to the amount of their loss, we submit that the fact of false swearing would be established. It is not required here that the defendant should, as in an indictment for perjury, designate which of the statements was false; the same exactness, we submit, is not required as in a criminal proceeding. It is enough if the plaintiffs have sworn falsely, and that they have sworn falsely would be the inevitable conclusion from the facts to be found by the jury, according to the prayer.

The Seventh Exception.

Is similar to the last. The proposition manifestly intended to be submitted to the court, though there is great want of precision in the form of it, is this, that if the plaintiffs have, on their examination under the policy, sworn that their debts at the time of the fire amounted to $18,000, and now swear that they amount to only $8,000, and if they on both occasions knew the truth, then they have sworn falsely and cannot recover. Rec., p. 17.

We submit, as in the last exception, that without determining which of the two depositions, if either, is true, it is enough that both cannot be true—one must be false, and the falsity of either is sufficient to defeat the plaintiffs' right of action.

The Eighth Exception.

The instruction asked in this case prescribed a rule for the jury to pursue in computing the amount of the stock on hand from certain data. The rule was undoubtedly correct arithmetically, but we do not see that it could be stated as a rule of law to be laid down by the court. Rec., p. 18.

The Ninth Exception.

The instruction in this case seems to be liable to the same objection as the last. Rec., p. 18.

Conclusion.

We submit that the judgment should be reversed, and a *venire de novo* awarded.

J. M. CARLISLE,
J. D. McPHERSON,
For Plaiatiffs in Error.

In Supreme Court of the United States.

THE GERMANIA FIRE INSURANCE CO.,
Plaintiff in Error,

vs.

CHARLES WEIDE & JOSEPH R. WEIDE,
Defendants in Error.

THE NIAGARA FIRE INSURANCE CO.,
Plaintiff in Error,

vs.

CHARLES WEIDE & JOSEPH R. WEIDE,
Defendants in Error.

THE REPUBLIC FIRE INSURANCE CO.,
Plaintiff in Error,

vs.

CHARLES WEIDE & JOSEPH R. WEIDE,
Defendants in Error.

THE HANOVER FIRE INSURANCE CO.,
Plaintiff in Error,

vs.

CHARLES WEIDE & JOSEPH R. WEIDE,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

LORENZO ALLIS,
Of Counsel for Defts in Error.

In Supreme Court of the United States.

THE GERMANIA FIRE INSURANCE CO.,
Plaintiff in Error,

vs.

CHARLES WEIDE & JOSEPH R. WEIDE,
Defendants in Error.

THE NIAGARA FIRE INSURANCE CO.,
Plaintiff in Error,

vs.

CHARLES WEIDE & JOSEPH R. WEIDE,
Defendants in Error.

THE REPUBLIC FIRE INSURANCE CO.,
Plaintiff in Error,

vs.

CHARLES WEIDE & JOSEPH R. WEIDE,
Defendants in Error.

THE HANOVER FIRE INSURANCE CO.,
Plaintiff in Error,

vs.

CHARLES WEIDE & JOSEPH R. WEIDE,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

I.

The question as to the admissibility of the books, etc., was disposed of in the Ætna Insurance Company vs. Weide, 9 Wall, 677.

II.

The request of plaintiff in error for instruction to the jury, as to the effect of refusals to answer questions, and of the neglect to produce duplicate invoices of goods purchased, (see pages 16 and 17 of printed record,) were improper.

First.—No call for duplicate invoices, no neglect to produce them, is pleaded in the answer for any purpose.

Second.—Refusals to answer are not pleaded so that the plaintiff in error could derive any advantage from them standing alone, (as they are described in the request,) and disconnected with other facts.

The extract from the policy, set out on pages 15 and 16 of the printed record, makes the examination under oath, when required, a part of the proofs of loss to be furnished by the assured. "And " until such examinations, &c., are permitted, the loss shall not be " payable." The refusal to submit to such examination is not made a cause of forfeiture. The only acts working a forfeiture are "All fraud or attempt at fraud, or false swearing, on the part " of the assured, shall cause the forfeiture of all claim under this " policy." Any refusal to submit to an examination, or to answer questions on an examination, as it would not, of itself, go to the merits of the defendants' claim on the policy, but only to when a suit might be brought on it, ought, if plaintiff intended to insist on the consequences of a bare refusal, to have been pleaded in abatement.

To make the matter good as plea in abatement, it would have been necessary to bring it strictly within the terms of the policy, to set forth that the plaintiff required of defendants to submit to

an examination under oath, such as the policy provided for, and designated some person to take such examination; that the examination was refused, or, if had, that defendants when undergoing it, refused to answer proper questions put to them by the persons taking it. And the plea should have set out the questions so that the Court, when called on to judge of the sufficiency of the plea, could have determined whether it was the duty of the defendants to answer them. And according to the rules of pleading in this District, these matters should have been stated separate from other matter of defense. The plaintiff, in its answer, has not met any of these requirements. It states only that the defendants, "and each of them, have, and did wholly refuse to answer "questions relating to the said loss propounded to them by the "agent of said company, and this defendant, as required by the "terms and conditions of said policy, as above stated, and about "the last of March or first of April, 1867." The occasion and circumstances of the refusal are not attempted to be set out, and it is not set out for the purpose of abating the suit, but as a part of the defence to the merits, based on the charge of attempted fraud, under that provision of the policy that fraud or attempt at fraud shall cause a forfeiture; and its statement is accompanied with the allegation, characterizing all the alleged fraudulent acts of defendants, that the assured "have so made "such statements and representations, and done such acts and "things as aforesaid, knowing the same to be false and fraudu-"lent, and with intent to defraud said defendants, as aforesaid." And immediately following is stated the effect which is claimed for the matters so pleaded and the purpose for which they are pleaded. "That thereby, and by reason thereof, all claim under "said policy is forfeited and made null and void by the terms "thereof."

The refusal, having been pleaded with the allegation that it was with intent to defraud, was no defence within the issues made, except accompanied with that intent And the request is wrong, because it assumes that under such issues a bare refusal, without regard to the intent with which the refusal was made, establishes the charge of fraud.

III.

The requests of plaintiff in error, for instructions to the jury, as to the effect of alleged discrepancies between statements in the defendants' proofs of loss or their examinations under oath, and their testimony as witnesses on the trial (page 17, printed record,) were improper.

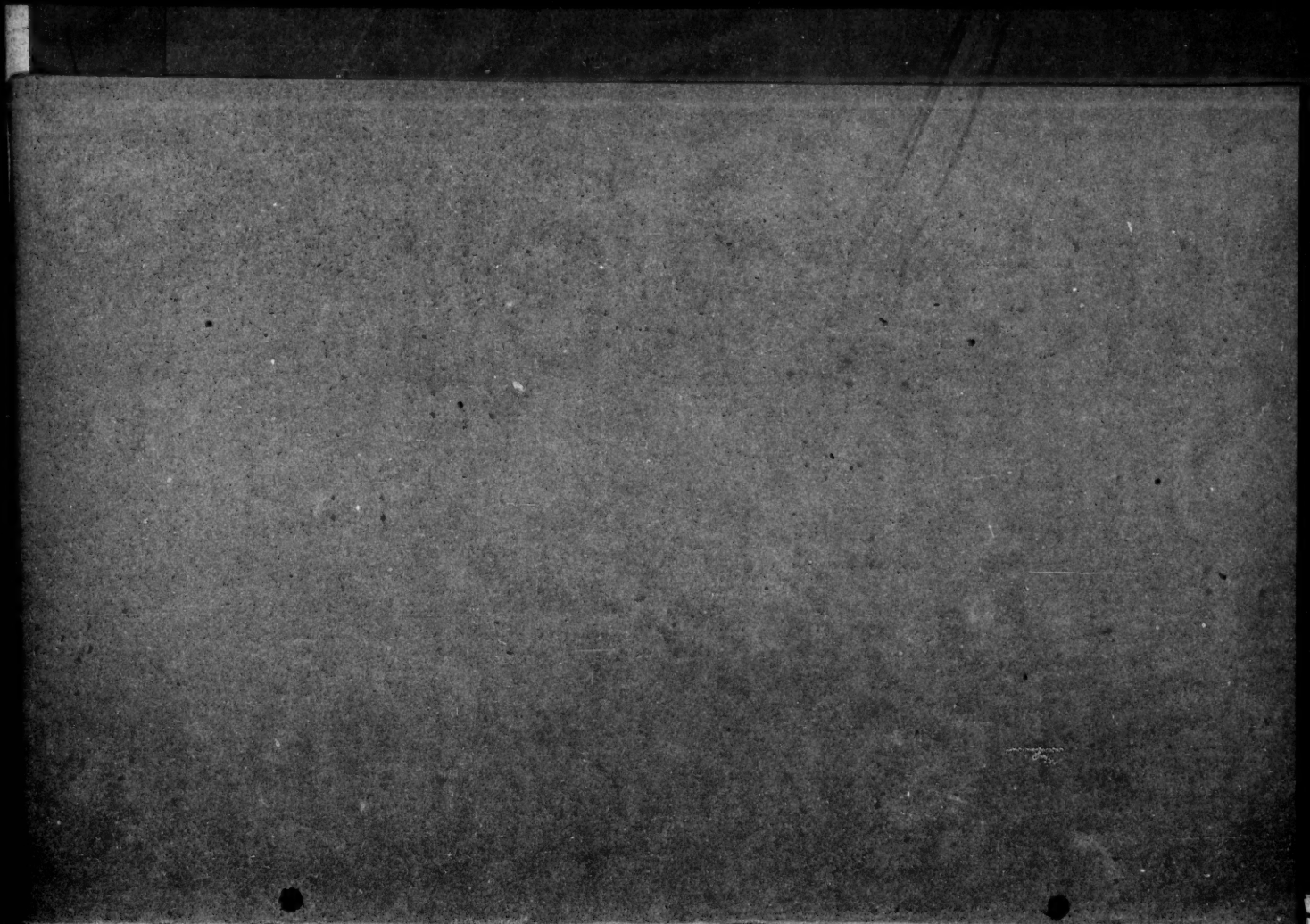
If the jury were satisfied that either of the defendants had as a witness, wilfully told a falsehood, they might of course, discredit his whole testimony, but such falsehood could not make a defence to the action.

The requests make no reference to which statement is true, that in the defendants' proofs of loss, or examination, or that in their testimony on the trial. They assume that if either is false, it is a defence to the action.

It is conceded, that if upon any oath taken pursuant to the policy, either of the defendants, with intent to influence the action of the plaintiff, wilfully swore falsely, it is a good defence. But if at the time of taking such oath, the party honestly believed a fact to exist, and therefore so stated it, that is not false swearing within the meaning of the policy, though the statement prove to be false. In such cases the utmost good faith is required of both parties: exemption from liability to err is not.

The requests make no reference to whether the false statement, whichever one it was, that sworn to under the requirements of the policy, or that made on the trial, was wilfully made, nor whether made in good or bad faith, but assume that if either was untrue, that alone is a defence.

IV.

If in any case such instructions to the jury as are set forth in plaintiff's last two requests (pages 18 and 19 printed record) could be proper; this is not such a case, for there is no evidence on which any such calculations or figures can be based.

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